IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a Corporation, *Respondent*.

BRIEF FOR RESPONDENT.

WILDER LUCAS,
ARNOT L. SHEPPARD,
WALTER N. DAVIS,
H. O'B. COOPER,
SIDNEY S. ALDERMAN,
Attorneys for Respondent.

S. R. PRINCE,
Of Counsel.

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TEXTS

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion to review which this Court granted certiorari on October 13, 1941, that is, the last opinion below of the United States Circuit Court of Appeals for the Eighth Circuit, is reported in 119 F. (2d) 85 and will be found in the record beginning at page 436.

A previous opinion of the same court, rendered on November 1, 1940, is reported in 115 F. (2d) 317 and will be found in the record beginning at page 402.

STATUTES INVOLVED.

The action was brought in the district court below under the Federal Employers' Liability Act (Act of April 22, 1908, ch. 149, 35 Stat. 66, as amended by the Act of April 5,

1910, ch. 143, 36 Stat. 291, 45 U. S. C. 51-59) for damages for the alleged wrongful death of petitioner's intestate and also for damages for the intestate's conscious pain and suffering prior to his death. (R. 2-4.) However, the sole asserted basis for recovery was an allegation of violation by respondent of the automatic coupler provision of section 2 of the Safety Appliance Act (Act of March 2, 1893, ch. 196, 27 Stat. 531, as amended by the Act of April 1, 1896, 29 Stat. 85, ch. 87, and by the Act of March 2, 1903, 32 Stat. 943, ch. 976, 45 U. S. C. 2), (R. 3) which section accordingly is particularly involved and which provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

THE SCOPE OF THIS COURT'S REVIEW.

The case is in a peculiar posture which makes it difficult to determine just what should or may be the scope of this Court's review on certiorari.

In its first opinion, in 115 F. (2d) 317 (R. 402-411), as we pointed out in detail in our brief in opposition to certiorari (pp. 7-8), the Court of Appeals below held with petitioner and against respondent on the liability issue, on the issue as to *res judicata* and collateral attack, and on the issue as to duress. It held with respondent and against petitioner as to error in the district court's charge. (R. 411.) The judgment which it then entered (November 1, 1940) reversed the district court's judgment in favor of petitioner and remanded for new trial on account of this error in the charge. (R. 412.)

Petitioner did not seek review of that judgment in his petition for certiorari. Indeed that judgment could hardly be reviewed, since the Court of Appeals below, on petitions for rehearing by both parties, itself vacated and set aside

that judgment by its order of December 7, 1940, granting rehearing and vacating the judgment of November 1, 1940. (R. 435). Neither party sought review of the order of December 7, 1940.

The action of the court below in setting aside its judgment of reversal and remand of November 1, 1940, and in granting rehearing of the case on the entire record, necessarily had the effect of setting aside its opinion of November 1, 1940, or of leaving it without legal significance as a *decision.*

In its second opinion, on the rehearing, rendered April 14, 1941, 119 F. (2d) 85 (R. 436-444), the court below dealt with and passed upon only the liability issue, the question of the sufficiency of the evidence to support the finding by the jury of a violation of the automatic coupler provision of the Safety Appliance Act. It held the evidence insufficient to support the verdict (R. 444) and entered judgment on April 14, 1941, reversing the judgment of the district court and remanding with directions to grant respondent's motion for judgment notwithstanding the verdict. (R. 444.)

In view of this disposition of the case, the Court of Appeals did not find it necessary on the rehearing to deal with or pass upon any of the other issues or questions dealt with and passed on by it in its previous vacated decision of November 1, 1940, or raised by other assignments in the record. It therefore has actually and finally passed on neither the question of *res judicata* and collateral attack, nor the question of the sufficiency of the evidence to support the finding of duress in the settlement and release, nor the question of error in the charge of the trial court, nor on any of the other assignments in the record.

Petitioner's petition for certiorari sought review only of the last judgment of the Court of Appeals below, that of April 14, 1941. (Petition, 1, 13-14.) The "questions presented" and the "reasons relied on for the allowance of the writ" dealt solely with the holding in that judgment that there was insufficient evidence of a safety appliance defect to support the verdict and the judgment of the district

court. (Petition, 8-10, 10-13.) The brief in support of petition for certiorari was devoted solely to that judgment and to those questions. (Pp. 15-35.) Presumably this Court granted certiorari solely to review that judgment and the question of liability on the evidence under the Safety Appliance Act for use of an alleged defective coupler mechanism, which was presented by the petitioner as "an important question of federal law which has not been, but should be, settled by this Court." (Petition, 10, 11.)

In our brief in opposition to certiorari we indicated that respondent relied, in opposition to certiorari, and would rely *in support* of the judgment below, if certiorari were granted, on other grounds in the record pressed upon the Court of Appeals below but not dealt with by it in its opinion and judgment now under review, any one of which, if ruled in favor of respondent, would support the same judgment of reversal and remand with instructions to grant respondent's motion for judgment *non obstante veredicto*, to-wit the defenses of settlement and release, of *res judicata* and collateral attack, and of insufficiency of the evidence to support the verdict setting aside the release on the ground of duress. (Brief in Opposition, 9-10, 29-32.)

That a respondent in certiorari may, without cross petition for certiorari, rely on such grounds in the record in support of the judgment under review, although the court below did not decide such grounds nor base its judgment upon them, whereas the petitioner in certiorari is ordinarily confined to grounds asserted in his petition as grounds for reversal, is clear. *United States* v. *American Ry. Ex. Co.*, 265 U. S. 425, 435; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560; *Langnes* v. *Green*, 282 U. S. 531, 535; *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Ticonic Nat'l Bank* v. *Sprague*, 303 U. S. 406, 410, Note 3; *LeTulle* v. *Schofield*, 308 U. S. 415, 421; *McGoldrick* v. *Compagnie Gen. Transatlantique*, 309 U. S. 430, 434. Compare, as to petitioner, *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, and cases there cited.

We suppose that when we indicated in our brief in opposition to certiorari our intention to rely, in support of the judgment below, on our defenses of settlement and release, *res judicata* and collateral attack, and insufficiency of evidence to support a finding of duress in the inducement of the release and settlement, we opened up those questions so as to entitle petitioner to present his opposing contentions on those questions, even though he had not raised them by his petition. This petitioner does in his "Supplemental Statement, Brief and Argument." (Pp. 12, 13-22.)

However, petitioner's supplemental brief goes much further than that. It relies on the holding in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, and asks this Court not only to review the decision by the court below in its first opinion and judgment of November 1, 1940, that there was reversible error in the district court's charge (Brief, 12-13, 23-25) but also to examine all of respondent's assignments of error in the court below, to hold all of them without merit, and upon the whole record to reverse the judgment of the Court of Appeals below and to affirm the district court's judgment in favor of petitioner.

Of course, we do not question this Court's *power* to decide all questions in the record upon the whole record, without leaving anything to be decided by the Circuit Court of Appeals. It did just that in *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra.* Under Section 240 of the Judicial Code (28 U. S. C. 347) this Court has *power,* in any case, civil or criminal, in a circuit court of appeals, by certiorari, either *before* or *after* judgment by such lower court, to determine the entire cause with full power and authority, and with like effect, as if the cause had been brought here by unrestricted appeal, or as if it had never gone to the Circuit Court of Appeals.

However, we do not understand that this Court makes a practice of exercising such admitted power generally in certiorari cases. *Langnes* v. *Green*, 282 U. S. 531, 538, drew the distinction between *power* and *practice.*

And we understand that it is still the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases coming from the federal courts that it considers questions urged by a petitioner or appellant not pressed or passed upon in the court below, *McGoldrick* v. *Compagnie Gen. Transatlantique*, 309 U. S. 430, 434, citing *Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, 225, and *Duignan* v. *United States*, 274 U. S. 195, 200, and that it will not on certiorari consider on behalf of petitioner questions not disclosed or raised by the petition and which, if disclosed, would not have moved it to grant certiorari, *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509, citing *Furness, W. & Co.* v. *Yang-Tsze Ins. Asso.*, 242 U. S. 430, and *Layne & B. Corp.* v. *Western Well Works*, 261 U. S. 387.

We do not believe this Court would have granted certiorari in this case to review the judgment of the court below of November 1, 1940, holding that there was reversible error in the district court's charge, if that had stood as the final decision of the court below, or to examine the entire charge to find whether, if there was error in the portion of the charge found by the court below to have been erroneous, it may or may not have been cured in other portions of the charge.

Nor do we believe that this Court would have granted certiorari to review the record and to determine the question whether there was sufficient evidence of duress to support a finding voiding the settlement and release by the administratrix.

Therefore, if the Safety Appliance Act question, upon which certiorari was sought and granted, which is the only question determined by the court below in the judgment now under review, should be determined against respondent and in favor of petitioner, we should expect this Court to reverse the court below on that question and to leave it free to pass finally on the question of errors in the charge and on the sufficiency of evidence as to duress and on other assignments of error in the record not previously passed upon by the

court below. If this Court holds with respondent on the liability, or Safety Appliance Act, question, then of course it will affirm the judgment below.

However, there is an important question of law on this record, determined against respondent by the first judgment of the court below, but vacated and pressed by us again on rehearing, but not again decided, which is of such character as we think would have moved this Court to grant certiorari to review it, whichever way it might have been decided below, because it involves an important question in the relations between state and federal courts and in conflicts of jurisdiction. See *Southern Railway Co.* v. *Painter*, decided November 17, 1941. That is the question of *res judicata* and collateral attack which we discussed in our brief in opposition to certiorari, pages 29-31, and which we shall discuss further herein. We rely upon that point *in support* of the judgment below, although the court below did not base its judgment upon it, and we ask this Court to pass upon that point, as well as upon the Safety Appliance Act liability question, whether or not it decides to follow the suggestion of petitioner and explore the entire record to pass upon all assignments raised below.

SUMMARY OF ARGUMENT.

Point One.

The decision below was right and in accord with decisions here. There was no sufficient evidence to support the verdict finding that petitioner's intestate came to his death as the result of a defective coupler mechanism.

Point Two.

In case this Court decides to review that now undecided question, there was reversible error in the trial court's charge, as held by the court below in its first, now vacated, opinion and judgment.

Point Three.

The administratrix not only made settlement and released her claim under express authorization of the probate court of Illinois which appointed her, but also, when she chose to repudiate the settlement and release, elected the remedy of a direct attack thereon for alleged fraud and duress in the said probate court. That court decided against her on the issues of fraud and duress. Its judgment is *res judicata* and could not be collaterally attacked in the liability action in the district court below.

Point Four.

The verdict of the jury is so indefinite as to be a nullity and in any event the judgment of the district court should have been reversed and remanded for a new trial at least, by reason of this error.

Point Five.

Numerous other assignments of error by respondent in the court below, but not passed upon by it, warrant reversal and remand for new trial at least.

1. Errors in instructions refused.
2. Errors in admission of evidence.

Point Six.

Eliminating wholly incompetent evidence admitted over objection and exception, and the admission of which was assigned for error below, there was no sufficient evidence to sustain the verdict finding that the settlement and release by the administratrix was induced by duress and setting aside the release. The release was therefore a bar to the action and the judgment of the district court should be reversed with directions to enter judgment for respondent *non obstante veredicto*.

ARGUMENT.

Point One.

The decision below was right and in accord with decisions here. There was no sufficient evidence to support the verdict finding that petitioner's intestate came to his death as the result of a defective coupler mechanism.

Assignment I (1, 2, 3) (R. 349-351.)

Assignment II (1, 2, 3) (R. 353-356.)

In limine, it is extremely doubtful whether the traumatic injury suffered by petitioner's intestate between the couplers actually caused his death, which occurred more than 51 hours later and the day after a surgical operation. (R. 131, 133.)

His widow, petitioner's predecessor administratrix, testified that he was a moderate drinker (R. 57) and that he drank liquor "about like ordinarily a man would drink." (R. 175.)

His attending physician testified that he developed delirium tremens in the hospital (R. 132) and that the direct cause of his death was the delirium tremens, with a cardiac dilatation and a certain amount of shock, but that delirium tremens was the principal cause. He further testified that Stewart's wife gave him a history of Stewart's laying off work drinking and told him that Stewart had laid off and been on a drunk just prior to the day of his injury (R. 133), although Mrs. Stewart denied this on the stand. (R. 175.)

A doctor of the allopathic school of medicine, witness for plaintiff (R. 232), who did not see (R. 237) nor treat Stewart (R. 239) and who knew nothing about the case except what he learned from examining the hospital records of the case (R. 202), expressed the opinion that delirium tremens was not a cause of the death (R. 238), although he testified that men do die of delirium tremens where they have been alcoholics and have received an injury. (R. 238.)

That delirium tremens following trauma to alcoholics is frequently fatal is well attested by the medical authorities.

In Cecil's Text Book of Medicine (W. B. Saunders Co., Philadelphia and London, 3rd ed., 1934) it is said:

> "*Trauma* may produce delirium tremens in men who have drunk large quantities of alcohol, and severe excitement or shock not infrequently produces it in individuals who have been accustomed to drink daily without becoming intoxicated. Fractures of the long bones and injury to the respiratory apparatus are apt to induce the condition, but injuries are less liable to play an etiologic role than are *infections* such as erysipelas and pneumonia." (p. 572.)

And the same text, under "prognosis", says:

> "Uncomplicated delirium tremens proves fatal in about 15 per cent of cases. If it is associated with such infectious diseases as pneumonia the outcome is apt to be fatal. The delirium tremens which follows trauma proves fatal in about 50 per cent of patients." (pp. 573-574.)

See also Keen's Surgery (W. B. Saunders Company, 1907), Vol. III, pp. 103-129, Witthause and Becker, Medical Jurisprudence (William Wood & Co., New York, 1894), Vol, I, pp. 514, 515, and Encyclopaedia Britannica, 14th Ed., Vol. 7, Delirium Tremens, pp. 167-168, all to the same effect.

This medical knowledge that delirium tremens following trauma may be the cause of death, finds reflection and recognition in decided cases. See *Ramlow* v. *Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027; *Sullivan* v. *Industrial Engineering Co.*, 173 App. Div. 65, 158 N. Y. S. 970; and *McCahill* v. *New York Transportation Co.*, 201 N. Y. 221, 94 N. E. 616.

From a juridical standpoint, we recognize that if a man, though an alcoholic, has not suffered delirium tremens, and if a tort feasor inflicts a traumatic injury upon him which induces delirium tremens, which in turn causes death, when the trauma would not have been fatal but for the previous alcoholic condition, the tort feasor may be liable on the

theory of proximate causation. See *McCahill* v. *New York Transportation Co., supra.*

Yet the district court below did not submit any such theory of causation to the jury. And we point out the foregoing facts not only to show that the actual cause of the death in this case was highly speculative, but also to reveal the extraordinary hardship of imposing on respondent a recovery of $17,500, in addition to the $5,000 which it had already paid the administratrix pursuant to a court approved settlement, on a theory of erecting an inference of a safety appliance defect in a coupler upon the presumption indulged that the deceased would not have done a negligent thing but would have acted with due care for his own protection.

Even if it were legally permissible to pile the Ossa of such an inference on the Pelion of such a presumption, how unsound a base would be such a presumption of due care in this case as applied to a man working the first day after a lay-off for a drunk, and such an alcoholic as that an ordinarily non-fatal, traumatic amputation of his forearm induced delirium tremens which caused his death

In our brief in opposition to certiorari, pp. 10-28, we discussed in considerable detail the evidence bearing on the liability issue, we quoted at length from the opinion of the court below on rehearing, in which that court carefully, analytically, and fully considered and reviewed the evidence and the authorities, and came to the conclusion that there was no substantial evidence to sustain the verdict, no substantial proof that there was any defect in the coupler mechanism within the meaning of the Safety Appliance Act, and that the plaintiff had not met the burden of proof as to the only allegation of breach of duty by respondent. We further made a brief review of authorities which we deemed pertinent. (Ibid., pp. 25-28.)

We see no reason to repeat here what was there said, but ask this Court to consider that in connection with the present brief. We shall here only undertake to supplement what was said in that brief.

The court below set out certain accepted and applicable tests of violation of the automatic coupler provision of the Safety Appliance Act, which neither of the parties questioned. The last of those tests it set out as follows:

> "It is generally held that a violation of the statute is shown by proof that cars *upon a fair trial* failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof." (R. 439.) (Italics ours.)

Ultimate decision of this point should turn, we think, on whether that is a correct legal test and whether the plaintiff met the burden of proof by showing a safety appliance defect under that test.

It will be remembered that in the case at bar there was no direct evidence of any defect in the coupler mechanism and that plaintiff relied entirely on circumstantial evidence to support her allegation that the "cars were not equipped with couplers coupling automatically by impact and which could be coupled without the necessity of men going between the ends of the cars" in violation of the Safety Appliance Act "so that at the time deceased was injured it was necessary for him in the exercise of his ordinary duties as a switchman for defendant in order to couple the said cars to go between the ends of same for the purpose of coupling them * * *." (R. 3.)

Not only was there no direct evidence of any defect in the mechanism or that it was not in efficient operating condition, but, as the court below pointed out (R. 442) "there had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect."

The burden was on plaintiff, therefore, to prove that the coupler mechanism was not in proper operating condition to couple automatically by impact, without the necessity of men going between the ends of the cars to make the coupling. She undertook to prove this solely by circumstantial evi-

dence and under the settled rule, where circumstantial evidence is relied on to prove a fact, the circumstances themselves must be proved and cannot be presumed. *Chicago, M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472.

The mere fact that Stewart went between the cars to make the coupling, if proved or reasonably inferred from the mere fact that he went between the cars, would not prove that it was *necessary* for him to do so in order to make the coupling and "necessity" is the statutory word. The statute only requires a coupler coupling automatically by impact (or uncoupling) "without the necessity of men going between the ends of the cars." He may have gone between cars because he thought it was easier, or quicker to open the knuckle by hand. Or he may have done so because his head was not clear on this particular occasion. Such conduct on the part of an employee makes nothing toward proving the railroad guilty of a violation of the statute.

There being no direct proof of any defect and no direct proof that on any previous trial this coupler had failed to operate efficiently, and the plaintiff relying wholly on circumstantial evidence, it certainly was her burden to meet the test of proof laid down by the court below, that is, to prove that *upon a fair trial* the cars failed to couple automatically by impact.

That is the test as laid by the leading text on the subject, Roberts Federal Liabilities of Carriers, 2d Ed., Vol. II, sec. 620, p. 1205, where it is said, with citation of many cases:

> "It is equally true, on the other hand, that proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Applying the test of operative efficiency, the courts have generally held that a violation of the statute is shown by proof that cars, upon a fair trial, failed to couple automatically by impact, although the failure of the appliance to work was unexplained, and even though it worked efficiently both before and after the occasion in question."

And again, the same author says, Vol. II, sec. 624, p. 1213, with particular reference to the pin lifter part of the device:

> "If the condition of a coupler is such that the knuckles *cannot* be opened with the use of the pin lifter and that either of them *must* be opened with the use of the hand, the coupler is defective within the meaning of the statute as it will not couple automatically by impact." (Italics ours.)

Petitioner's theory in this case is that the coupler controlled by the pin lifter on Stewart's side of the train *could not* be opened with the use of the pin lifter and, therefore, that he *had to* open it with the use of his hand by going between the ends of the cars, in order to make the coupling.

But where is the proof of these facts? There is none.

The circumstantial theory upon which petitioner relies is that Stewart must have tried to open the knuckle with the use of the pin lifter, that he must have made a fair trial of the pin lifter, that he must have found on such fair trial that he could not open the knuckle with the pin lifter, and therefore must have gone between the ends of the cars to open the knuckle by hand, because he had to make the coupling and could not open the knuckle by the use of the pin lifter on a fair trial of that device in the usual method of its operation. The circumstantial theory would be sound if there were proof of the circumstances relied upon. But there is complete absence of proof of the circumstances. *The theory rests entirely upon presuming the circumstances.*

The only fact that is proved is the mere fact that Stewart went between the ends of the cars while engaged in a coupling operation. From the proof of this fact it possibly may reasonably be inferred that he went between the cars in order to open one of the knuckles so as to make the coupling.

But the mere proof of this fact, with all reasonable inferences that can be drawn therefrom, cannot establish that

Stewart tried to open the pin lifter before he went between the cars, or that, assuming that he tried it, he gave it a fair trial, or that it would not work upon a fair trial in accordance with the ordinary method of operation. Every one of these circumstances must be presumed. There is no proof of them.

As we pointed out in our brief in opposition to certiorari, whatever proof there was in the case tended solely to disprove all of the circumstances referred to in the last paragraph. It will be recalled that the plaintiff used the engineer as her witness. The engineer testified (R. 441), as the court below pointed out, that he was taking his signals from the deceased; that there was no obstruction between him and the deceased when the latter gave the engineer the stop signal and went between the cars; that the visibility was "pretty clear"; that the deceased signaled with his hand, which the engineer could see; that the engineer was looking at the deceased for signals all the time; and that he did not notice the deceased attempt to use the pin lifter before he went in between the cars.

As the court below said (R. 441), "this would seem to be proof of a negative as nearly as such proof could be made. * * * The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds."

In that connection the court below cited its own decision in *Chicago, M. St. P. & P. R. R. Co.* v. *Lineham*, 66 F. (2d) 373, in which case it made an elaborate review of decisions of this Court, of the lower federal courts, and of various state courts, under the automatic coupler provision of the Safety Appliance Act. And in that case the court held that if the plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect; that just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated; that there is no accurate measuring stick; that one pull of the lever might be sufficient

if enough force is put behind it, and there might be as much force exerted in one pull as in two or three. But the court held that the ultimate question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?

We submit that the holding by the court below in the *Lineham Case*, as well as its holding in this case, is absolutely sound; that in a case of this character the burden is on the plaintiff to prove that the deceased tried to open the knuckle by the use of the pin lifter before he went between the ends of the cars, that he gave it a fair trial, that he made an earnest and honest effort to operate the coupler in an ordinary and reasonable manner and applied enough force to the pin lifter to open the knuckle if the coupler was in proper condition, and that upon such trial the device would not operate. Unless all of these facts are proved no possible inference of a defective coupler within the meaning of the statute can be drawn from the mere fact that the injured employee went between the ends of the cars to adjust the coupler.

In our case none of these facts was proved and the evidence of the engineer, petitioner's own witness and the only eye-witness, has no other tendency except to negative the fact that Stewart made any effort to open the knuckle by use of the pin lifter.

If, under these circumstances, an inference of a defect in the coupler can be drawn from the mere fact that the employee went between the ends of the cars, or from superimposing such an inference upon a basic presumption of non-negligence of the employee, that is that he would not have gone between the ends of the cars unless he had made a fair effort to open the knuckle by use of the pin lifter and such effort had failed, then section 2 of the Safety Appliance Act ceases to be an automatic coupler act and becomes merely an automatic liability act. If this can be held, there is no burden on the plaintiff in a case of this kind to prove

that the defendant has violated section 2 of the Act, no burden to prove that the coupler mechanism was defective.

If petitioner's theory in this case is sound, then a railroad is automatically liable in every instance in which an employee goes between the ends of cars to adjust a coupler knuckle and is injured, and without any proof at all that the coupler device was defective or that the knuckle could not be opened in the ordinary and usual manner by a proper effort to operate the pin lifter. This is necessarily so because, if petitioner's theory is sound, then in every such case, just as in this case, the court must indulge the basic presumption that the employee would not have done a negligent thing, must presume that he would not have gone between the cars without first making a fair and sufficient effort to operate the device by use of the pin lifter and without finding that upon such fair effort that he could not open the knuckle by use of the pin lifter. In every such case, then, as in this case, an inference of a safety appliance defect will be pyramided upon a presumption of the non-negligence of the employee, and absolute liability of the railroad will follow from proof of nothing except the fact that the employee went between the ends of the cars and that he sustained an injury as the result.

No such rule of law can be drawn from any of this Court's decisions under the Safety Appliance Act.

In the leading case of *Johnson* v. *Southern P. Co.*, 196 U. S. 1, there was clear proof that, as this Court stated on page 20:

> "In the present case the couplings would not work together, Johnson *was obliged* to go between the cars, and the law was not complied with." (Italics ours.)

Certainly the Court in the *Johnson Case* considered that the burden of proof was on the plaintiff to show that the couplers would not work.

In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 583, there was clear proof that "owing to a defect in the coupler in the eastern end of the two cars attached to the engine, the coup-

ling could not be made without a man going between the ends of the cars." The Court in that case treated that as one of the undisputed facts in the case. It certainly did not consider that that fact could be merely presumed in the absence of proof.

Chicago, B. & Q. Ry. Co. v. *United States*, 220 U. S. 559, held that the duty imposed by the Safety Appliance Act is absolute, but it contained no suggestion that a court could presume the fact of violation of the statute or could base a finding of such fact on an inference based on a presumption of the plaintiff's due care.

In *Minneapolis, St. P. & S. Ste. M. Ry. Co.* v. *Popplar*, 237 U. S. 369, 370, there was testimony that the decedent attempted to uncouple the head car; that he tried repeatedly to do this by pulling the coupler pin with the lifter at the end of the next car, but without success, and that then, stepping between the two cars, while they were moving at the rate of about four miles an hour, in order to effect the uncoupling by hand, he was run over and killed. Further, in that case (p. 370), the conductor, who examined the coupling mechanism soon after the accident, testified that it worked with difficulty and that he would have reported it as a "bad coupler" had it been brought to his attention. Under these facts, this Court held that there was sufficient evidence to go to the jury upon the question of whether, in fact, the coupler was defective.

In deciding that case, we think it clear that this Court recognized the burden upon the plaintiff to prove the fact of a defective coupler mechanism, and certainly did not recognize any rule of law which would allow this essential fact to be presumed or inferred from the mere fact that the employee went between the ends of the cars and was injured.

In *St. Louis etc. R. R.* v. *Conarty*, 238 U. S. 243, this Court held that the Act was not intended to provide a safe place between colliding cars. It held that where the deceased was riding on a colliding engine, not endeavoring to couple a car or to handle it in any way, and when his engine collided

with a defective car which had no coupler or drawbar, and he was killed by reason of the fact that if the missing coupler and drawbar had been in place they would have kept the engine and car far enough apart to prevent his injury, that fact did not bring the case within the statute. Thus, in that case, where there was clear proof that the coupler mechanism was entirely missing, this Court held the railroad was not liable, because the defective coupler was not the proximate cause of the accident, the collision by the engine being the proximate cause.

In *San Antonio etc. Ry. Co. v. Wagner*, 241 U. S. 476, 479, there was direct evidence that upon the first impact the coupling "wouldn't make," and further evidence that after the failure to effect the coupling on the first impact the coupler was out of adjustment so that the employee had to reach in with his foot to shift the drawhead over so the coupling could be made. In doing this he slipped, fell, and was crushed.

This Court, in that case, held that there was sufficient evidence to support a finding of a violation of section 2 of the Safety Appliance Act and held that such violation, being proved, constituted negligence *per se*. But certainly this Court, in that case, did not go on the theory that there is no burden of proof on the plaintiff to prove the defective condition of the coupler or that such condition could be presumed or inferred from the fact that the employee went between the cars to manipulate the mechanism and was injured.

In *Atlantic City R. R. Co.* v. *Parker*, 242 U. S. 56, there was proof that the drawhead was so far out of line that it was *necessary* for the brakeman to reach in with his arm for the purpose of straightening it so as to make the coupling possible. There was proof that there was too much lateral play in the drawheads. On such proof this Court held that there was sufficient evidence to support a finding of violation of the Act. Clearly this Court considered that the burden was on the plaintiff to prove that the coupler was defective and in that case the plaintiff proved it.

Some of the language in *Louisville & N. R. R. Co.* v. *Layton*, 243 U. S. 617, seems inconsistent with some of the language in *St. Louis & S. F. R. R. Co.* v. *Conarty*, 238 U. S. 243. In the *Layton Case*, this Court held that the protection of the Act is not limited to employees engaged in coupling or uncoupling, and that where the proximate cause of an injury to an employee not engaged in coupling or uncoupling was a defective coupler in violation of the Act, the railroad was liable. The duty imposed by the Act was again treated as absolute. But again there was no suggestion that the burden was not on the plaintiff in such case to prove the fact of a defective coupler and that his injury proximately resulted from such injury.

In *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455, this Court reaffirmed the doctrine of *St. Louis & S. F. R. R. Co.* v. *Conarty*, 238 U. S. 243, distinguished the case of *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617, and also distinguished the case of *Minneapolis & St. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66, which we shall discuss in a moment.

Whatever inconsistency there may be between the Court's language in the *Conarty Case, supra*, and its language in the *Layton Case, supra*, was resolved and clarified by this Court in *Davis* v. *Wolfe*, 263 U. S. 239, 243, where, after discussing the *Conarty Case*, the *Lang Case*, the *Layton Case* and the *Gotschall Case*, this Court said:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

And in *Davis* v. *Wolfe, supra* (p. 244), this Court specifically held that "there was substantial evidence tending to show that the defective condition of the grab iron required by section 4 of the Safety Appliance Act was a proximate cause of the accident resulting in injury to Wolfe while in the discharge of his duty as a conductor." Certainly no implication can be drawn from that case that the fact of safety appliance defect can be presumed or that the burden is not on the plaintiff to prove it.

In *Chicago G. W. R. R. Co.* v. *Schendel*, 267 U. S. 287, there was clear proof of a defective coupler mechanism. There a drawbar pulled entirely out of a car in the train in main line movement. The crew chained this car to the one ahead. The engine pulled the whole train into an adjacent siding, on a gentle grade, and stopped. The intention was to detach the damaged car and leave it there by cutting off the engine, bringing it around to the back of the train, cutting off the rear portion, leaving the crippled car, and then to couple the rear portion to the front portion of the train and move on. Schendel's intestate, Ring, acting under his conductor's directions, went between the cars to disengage the chain, serving as a substitute for the missing coupler, and while so engaged was caught by the chain and killed when the car ran down the grade.

There was no doubt in that case of the clear proof of a defective coupler and that the defect caused the injury. This Court said (p. 292):

> "He went into the dangerous place because the equipment of the car which it was necessary to detach did not meet the statutory requirements especially intended to protect men in his position."

Not only can no inference be drawn from that case that the harsh rule of absolute liability under the Safety Appliance Act can be imposed without proof of defective mechanism in violation of the Act, but this Court in that case reaffirmed the *Conarty Case* and *Davis* v. *Wolfe*, saying (p. 291):

"*Louisville & Nashville R. Co.* v. *Layton*, 243 U. S. 617, must be understood as in entire harmony with the doctrine announced in *St. Louis & S. F. R. R. Co.* v. *Conarty*, and not as intended to modify or overrule anything which we there said."

In *Minneapolis etc. Ry. Co.* v. *Goneau*, 269 U. S. 406, a train had parted between two cars, due to a defective coupler, and the brakeman went between the ends of the cars and, while exerting himself to bring the defective part into place, lost his balance as a result of its sudden yielding, fell from a bridge on which the car was stopped, and was injured. There the proof of the actual defect was clear. This Court, upon such proof, held that the defective car was "in use" though motionless; that the brakeman was engaged in a coupling, not in a repair; that the defective coupling was the proximate cause of his injury, hence the defense of assumption of risk was abolished by the Federal Employers' Liability Act; and that the provisions of section 4 of the Supplemental Safety Appliance Act of 1910, avoiding penalties in connection with a car becoming defective in transit, had no application to relieve the railroad of liability to the injured employee.

Specifically this Court held in that case that there was substantial evidence (which it reviewed in detail) tending to show that the coupler was defective (p. 408), and it further specifically held that "there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident resulting in the injury to Goneau while he was engaged in making a coupling in the discharge of his duty, * * *" (pp. 410-411.)

There was no suggestion by this Court in that case that either of these two branches of proof (1) that the coupler was defective, or (2) that the defect was the proximate cause of the injury, could be dispensed with by indulging a presumption of non-negligence of the employee or by basing an inference of a defective coupling on such presumption.

Swinson v. *Chicago, St. P., M. & O. Ry.*, 294 U. S. 529, applied the settled rule of liberal construction of the Safety Appliance Act so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. It affirmed a recovery for an injury to a brakeman who was using a defective grab iron as a foot brace, instead of as a hand hold, but in that case there was sufficient evidence that the grab iron was not secure enough for its intended use as a hand hold, as well as evidence that its use as a foot brace was customary. There was no suggestion that a finding that the device was defective could be grounded on a presumption of the employee's non-negligence. All the implications are to the contrary.

Brady v. *Terminal R. R. Assn.*, 303 U. S. 10, the latest expression by this Court under the Safety Appliance Act which we have found, was a case involving clear proof of a defective grab iron. The board to which it was attached was rotten from end to end on the under side and to some extent on the upper side around the bolts with which the grab iron was attached to the board. That case reaffirmed *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, and *Davis* v. *Wolfe*, 263 U. S. 239, and all of its implications are in harmony with those cases.

Where a statute imposes an "absolute liability" for use of a defective appliance, where negligence need not be proved and due care is no defense, it seems to us that courts ought to scrutinize evidence with care to see whether it can fairly be said that the plaintiff has met the burden of offering substantial proof of the very basic fact that there was a defective appliance in use in violation of the statute.

We think the proposition just stated is implicit in the unanimous holding by this Court in *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398, where, with particular consideration of the rule of absolute duty and of absolute liability for its violation under the Boiler Inspection Act, it was held that "it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experi-

mental purposes, should become part thereof within the rule of absolute liability." (P. 402.) This Court therefore held that the device known as the "watchman," not required by the rules of the Interstate Commerce Commission, not in general use but used by the one carrier experimentally, which could not add to danger but might or might not prevent a derailment which would have occurred but for its presence on the locomotive, was not a part of the locomotive within the meaning of the Act.

Petitioner in our case, however, relies strongly on *Minneapolis & St. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66, and seeks to draw from that case a rule that there need be no proof that a coupler is defective, but that such fact can be implied from the mere facts of an accident and an injury.

But the *Gotschall Case* dealt with a very special situation of a moving freight train parting because of an unexplained failure or opening of a coupler. The brakeman, walking over the top of the cars, fell and was killed when the train parted. The railroad was held liable. This Court in effect applied the doctrine *res ipsa loquitur* to that special situation, although it conceded, under authority of *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, and *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, that that doctrine, that negligence may be inferred from the mere happening of an accident, will not be applied "except under the most exceptional circumstances" (p. 67.)

The case of a moving train parting because a coupler uncouples certainly presents such exceptional circumstances. According to universal, ordinary experience, a proper automatic coupler, once coupled, stays coupled until human agency intervenes to uncouple it. The essential function of an automatic coupler is to couple and stay coupled until uncoupled. The circumstance of a coupler parting and breaking a moving train is so extraordinary, so contrary to experience, that *res ipsa loquitur* may well apply. Automatic couplers simply do not part in that way unless there is something wrong with them.

But our case presents a very different situation. Our case deals with human conduct, not mere mechanical, functional failure. It cannot be said, according to any universal or ordinary experience, that brakemen do not ever go between cars to make couplings unless there is mechanical defect in the coupler. They do it every day, whether negligently, thoughtlessly, in haste, or because they think it easier than to operate the pin lifter. Anyone who has watched brakemen and switchmen working, and we all have, knows this. Proof that such a man goes between cars is wholly insufficient to prove that the mechanism is defective or that a failure of the pin lifter to operate properly has made his going between cars necessary.

In the *Gotschall Case* there was undoubted failure of the mechanism. That was just what was shown. In our case there is no proof of defect in or failure of the mechanism. There is only proof of human conduct of the deceased, Stewart, which he ought not to have engaged in, which he need not have engaged in, if a fair use by him of the pin lifter could have opened the coupler knuckle. But there is no proof that he tried to use the pin lifter at all, no proof that it failed to work, and the evidence of the only witness, petitioner's witness, the engineer, tends only to show that Stewart did not try to use the pin lifter at all.

Under this state of proof, petitioner would have the court and jury base a finding of a defective coupler mechanism upon the indulgence of a pure presumption that Stewart would not have acted carelessly or negligently. Upon that presumption petitioner would build an inference that Stewart must have tried to open the coupler with the pin lifter, an inference that he must have given it a fair trial such as, under ordinary practice, was sufficient to open a 40 pound knuckle if not defective, an inference that upon such trial he could not open the knuckle, and an inference that the coupler was defective and that the defect was what caused Stewart (a human agent acting under his own volition) to go between the cars.

We think petitioner's theory clearly violates the holding by this Court in *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 487, 488, and is contrary to the holdings and to all the implications of the holdings in the decisions of this Court, above reviewed, dealing particularly with the Safety Appliance Acts.

We think petitioner misuses a presumption, the presumption of due care on the part of the deceased, which does exist where there is an issue of contributory negligence, as to which the burden is on defendant. The problem really goes to the question of the burden. See Wigmore on Evidence, 3rd Ed., Vol. 9, sec. 2507. On an issue of contributory negligence, the burden is on the defendant pleading that defense to overcome the presumption that the plaintiff was not negligent. All the cases relied on by petitioner as indulging a presumption of non-negligence of the injured party will be found to have dealt with such issue.

But on an issue as to the defendant's negligence (or violation of a statutory requirement whose violation amounts to negligence *per se*) the burden is on the plaintiff, and for the very reason that on such issue there is indulged a like presumption that the defendant was not negligent. On such issue, a finding that defendant was negligent (or violated a safety appliance statute) cannot be based on presuming that the plaintiff, or his decedent, would not have been negligent. *Looney* v. *Metropolitan Railroad Co., supra.* To do that would be to wipe out entirely the burden on plaintiff, and to postulate, on the sole basis of presumption without proof, the very violation of the safety statute alleged by plaintiff as the sole negligence of defendant.

That is what this case comes down to.

It remains to examine briefly some of the decisions by lower federal courts under the Safety Appliance Act.

Petitioner relies upon *Didinger* v. *Pennsylvania R. Co.* (C. C. A. 6th), 39 F. (2d) 798, but that case is wholly distinguishable from ours and for the very reason that there

it was proved * that the employee operated the device, set the hand brake, ratchet and dog, in the proper and usual manner, firmly engaged and set them, and that thereafter the brake suddenly "gave away". There the very thing was proved which was not proved in our case, that the employee operated the mechanism in the proper and customary way and that thereafter there was a mechanical failure, from which a defect could have been inferred.

As to how a safety appliance defect can be proved, the court said (p. 799):

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner."

In our case neither recognized method of proof was followed. There was no proof of a particular defect. And there was no proof that Stewart operated the device with due care, in the normal, natural, and usual manner and that it failed to function. In lieu of such proof, petitioner would have the Court presume that Stewart would not have done a negligent act and therefore to presume that he tried the pin lifter with due care, in the normal, natural, and usual manner, and that it would not work.

Vigor v. *Chesapeake & O. Ry. Co.* (C. C. A. 7th), 101 F. (2d) 865, was just like *Minneapolis & St. L. R. R. Co.* v. *Gotschall*, 244 U. S. 66, *supra*, a case of an unexplained parting of couplers in a train, without human intervention.

In *Terminal R. R. Ass'n. of St. Louis* v. *Kimbrel* (C. C. A. 8th), 105 F. (2d) 262, plaintiff contended and proved that when he came up to the ends of the cars he found that the knuckles of both couplers were closed and that it would be

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* That is, offered to prove by opening statement. Verdict against plaintiff was directed upon plaintiff's opening statement. The Court of Appeals reversed, treating the opening statement, of course, as proof.

necessary to open one of them in order to effect a coupling; that after some slack had been made he tried to open the knuckle by means of the pin lifter without going between the cars but that "the pin lifter would not budge" and so he went between the cars to open the knuckles by hand. As he did so the cars were pushed together without warning and his arm was caught, injured, and had to be amputated. The very proof was in that case which is totally lacking in ours.

Affirming recovery by the plaintiff, the court approved, as correctly declaring the settled law, the following instructions by the trial court (p. 264):

> "The Court charges the jury that no liability on the part of defendant arises from the mere happening of the accident. The mere fact that an accident happened is not proof that the coupler would not couple automatically by impact. There is no presumption in this case that the coupler would not couple automatically by impact.
>
> "The Court charges the jury that the mere fact that the plaintiff may have sustained an injury, if you so find, is not sufficient to warrant you in returning a verdict against the defendant in this case. You cannot presume that the couplers would not couple automatically by impact, but on the contrary the law places on plaintiff the burden of proving such fact, to your reasonable satisfaction, by the greater weight or preponderance of the credible evidence."

In our case there was total failure of any proof that Stewart made any effort to use the pin lifter. There was no proof that he gave it a fair trial, or endeavored to operate it in the ordinary, usual, and natural manner, and that it would not work. The only pertinent evidence, the testimony of the engineer, plaintiff's witness, who was watching Stewart all the time for signals, tends only to prove that Stewart made no effort to use the pin lifter.

Petitioner sought certiorari here upon a contention that the court below held that in order to recover on the ground of violation of the automatic coupler provision of the

Safety Appliance Act for the death of an employee resulting from fatal injuries sustained by him while between two cars attempting to open the knuckle by hand, there must be testimony of an eyewitness to the casualty showing affirmatively that the deceased employee, before going between the cars to open the knuckle by hand, tried to open it by using the pin lifter at the side of the car. (Petition, pp. 10-11, Brief in Support of Petition, p. 16.)

That is a wholly inaccurate summary of the holding below. Here there was an eyewitness. He was plaintiff's witness. He was the only eyewitness. He was watching Stewart all the time for signals. He testified that the visibility was good and that he saw Stewart's signals but that he did not notice Stewart make any effort to use the pin lifter before going between the cars.

Under that testimony of the eyewitness, the court below held that it could not be presumed that Stewart did try the pin lifter, or that he gave it a fair trial, and that it would not work. Under all the authorities the decision was, we submit, obviously right. Any other holding would, we submit, utterly abolish the plaintiff's burden of proof and would mean that in any case mere proof that the man went between cars to open the knuckle is sufficient to establish, by pure presumption, that the coupler was defective.

That would destroy the statutory test of the sufficiency of the coupler and would leave liability *vel non* of the railroad to depend wholly on the act of a voluntary human agent, whose actions the railroad cannot possibly control.

It is a Safety Appliance Act, not an act imposing absolute liability on the railroad for unsafe conduct of an employee.

But, petitioner asserts, there was sufficient evidence that the coupler was defective, in the testimony of Stogner, the other switchman, as to what he did after the accident, assuming, which petitioner's theory of the case so far does not assume, that the burden is on plaintiff to prove a defect and that it cannot be presumed.

The court below dealt fully and correctly with that contention. (R. 442-444.) We quoted the pertinent part of the opinion in our Brief in Opposition to Certiorari (pp. 16-17). The treatment by the court below of Stogner's testimony and its holding regarding it seems so obviously right as to need little additional discussion here.

Stogner was the other switchman in the same crew. (R. 26.) The accident occurred about 5:40 p. m. on the 12th of February, 1937, a dry day. (R. 26, 27.) They had probably eighteen or twenty cars on the track, coupling them up. About seven or eight of the cars were attached to the engine and the engine was headed west. The track was straight. (R. 27, 28.)

Stogner at the moment was engaged in taking a check of the cars, that is, getting a list of where they were to go. He was about eighty or ninety feet east of Stewart. The engineer on the engine was west of Stewart and accordingly Stewart was between Stogner and the engineer. (R. 28.)

The switchmen were working on the engineer's side, which was the north side. (R. 29.) The last time Stogner saw Stewart before the accident was about three, or four, or five minutes before. Stogner did not see Stewart attempt to lift the pin lifter on either of the cars between which he was found. He did not know whether Stewart tried to lift the pin lifters or not. He was not watching Stewart. (R. 42, 43.)

Stogner testified that the first notice he received that Stewart had been injured was when he heard Stewart holler. Stogner then ran to him. He found him with his right arm caught between the couplers, both of which were closed. (R. 29.) He testified that it is impossible to couple cars with both knuckles closed; that they can be coupled with one knuckle open and one closed, or with both knuckles open; that you have to have at least one knuckle open in order to make an automatic coupling. (R. 31.) He described the coupler knuckles and the pin lifter mechanism which is for the purpose of opening the knuckles. He de-

scribed the method of opening the knuckle by the pin lifter, "you would walk up to the car and reach down and get the lever and jerk the lifter and it kicks open." (R. 31.) "If you do not open by pin lifter, you jerk it a time or two, you go and pull this apart, open that car, and by reaching in you put your body in between the cars." (R. 33.)

Stogner's testimony expressly shows that switchmen frequently, instead of relying entirely on the pin lifter on the side of the car to open the knuckle, do it by using both hands, one hand on the pin lifter and one on the knuckle. He testified that that method would give leverage, holding the weight of the knuckle off itself. (R. 34.) Thus his testimony without contradiction shows, what we have above stated, that switchmen frequently go between the cars to open a knuckle for their own convenience instead of relying on the pin lifter.

Then Stogner further testified (R. 34):

> Q. How heavy are those things that swing out, pretty heavy?
>
> A. Why yes, they weigh probably forty pounds, in that neighborhood.
>
> Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?
>
> A. I did.
>
> Q. How did you open the knuckle?
>
> A. I opened it with my hand.
>
> Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?
>
> A. No, sir.
>
> Q. Mr. Stogner, did Mr. Stewart have any other duty there at the time other than to couple these cars?
>
> A. None that I know of.

The only other pertinent evidence of Stogner as to what he did when he coupled the cars after the accident is the following which occurred on cross-examination (R. 36):

Q. Now, which knuckle did you try to open, or which pin lifter did you try to use?

A. The one on the north side.

Q. On the north side?

A. Yes, sir.

Q. And which car was that?

A. Well, that was the east car on the opening.

Q. The east car?

A. Yes, sir.

Q. And the pin lifter on the other car was there also, was it?

A. Yes, sir.

Q. And did you try to open the knuckle with the pin lifter on the other car?

A. No, sir.

On re-direct Stogner explained that there was only one pin lifter on the north side, that is that the pin lifter on each car as you face the end of the car is on the left side of the car. (R. 38-39.)

Giving every possible reasonable inference to this evidence by Stogner as to what he did when he coupled the cars after the accident, it utterly fails to establish any facts from which a reasonable inference can be drawn that either of these couplers or pin lifters was defective even after the accident which injured Stewart. Though the question on cross-examination as to which knuckle he tried to open or which pin lifter he tried to use was ambiguous, since Stogner testified in answer "the one on the north side," it is evident that he tried the pin lifter on the north side. But it is perfectly consistent with his testimony that he may have opened the coupler knuckle in the method he had previously described, that is by handling the pin lifter with one hand and reaching in to open the knuckle with the other hand. He testified that he opened the knuckle with his hand and that he tried to use the pin lifter on the north side. He did not testify that the pin lifter would not open the knuckle. He did not testify that he jerked the pin lifter, as he had previously testified it was necessary to do in order to open the knuckle. He did not testify

what kind of a trial he gave it or whether he applied sufficient force to open the 40 pound knuckle. He did not testify that he had to go between the cars and open the knuckle by hand because he could not open it by use of the pin lifter. He gave no testimony from which it can be inferred, in the language of the Sixth Circuit Court of Appeals in *Didinger v. Pennsylvania R. Co.*, 39 F. (2d) 798, 799, that he attempted to operate the pin lifter with due care, in the normal, natural and usual manner and that it failed to function.

The only way petitioner can assert that Stogner's testimony has any tendency to prove that the coupler mechanism was defective or out of adjustment, even after the accident, is by indulging as to him the very same presumption of non-negligence which petitioner insists should be indulged as to Stewart. Petitioner asks the Court to indulge the presumption that Stogner would not have gone between the cars or reached between them to open the knuckle by hand unless he had first made a fair, normal and reasonable effort to open the knuckle by use of the pin lifter on the north side. Petitioner therefore asks the court to presume, in the absence of any proof, that Stogner gave a fair trial and was unable to open the knuckle by use of the pin lifter and therefore was obliged to go between the cars to open the knuckle by hand. From such presumption, and from it alone, petitioner would draw the inference that the coupler mechanism was defective.

The court below, after quoting the question and answer testimony of Stogner, very fully considered all the reasonable effect of Stogner's testimony, including his answer on cross-examination that he tried the pin lifter on the north side. It said (R. 442-444):

> "There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it

is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler or pin lifter on this particular car did not operate satisfactorily. On cross-examination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, 'The one on the north side.' But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make 'an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner,' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. '* * * where proven facts give equal support to each of two inconsistent inferences; * * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * *', *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Wheelock* v. *Freiwald*, 8 Cir., 66 F. 2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. *Midland Valley R. Co.* v. *Fulgham*, 8 Cir., 181 F. 91.

"There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor nothwithstanding the verdict."

It is to be remembered that Stogner was an eye-witness as to what he did. He had full knowledge as to what he did. This is no situation in which the defendant employer had knowledge peculiar to it and not available to the plaintiff. Stogner was the foreman of the switching crew. He was the plaintiff's witness and whatever knowledge the defendant railroad had was through the knowledge the plaintiff's witness Stogner had. He knew whether he made a sufficient trial of the pin lifter to open a knuckle in proper working condition. He did not testify that he did. He knew whether he was unable to open the knuckle by use of the pin lifter. He did not testify that he was unable to do so and counsel for the plaintiff did not ask him the question. He knew whether the apparatus at the particular time was in proper working condition and his knowledge of that fact was all-inclusive of any knowledge the defendant could have had of that fact. He did not testify that the mechanism was not in proper working condition and plaintiff's counsel did not ask him that question. The burden of proof here was still on the plaintiff and the plaintiff failed entirely to make the proof necessary as the basis of any inference that there was any defect in the mechanism or in its adjustment.

And moreover, as the court below aptly pointed out, Stogner did not even testify that his trial of the pin lifter on the north side came after he had opened the knuckle by hand or before. This very essential element is left to conjecture and speculation.

Again, as the court below aptly pointed out, all of Stogner's testimony as to what he did in connection with the mechanism related to a time subsequent to the accident which crushed Stewart's arm. Stewart's arm had been

crushed by a violent movement of the cars from the other end of the string, that is the end away from the engine, these cars being shunted west, that is toward the engine and the cars attached to the engine, from the east, by some force as to which the record is silent, and no cause of action was predicated upon that force or movement of the cars. (R. 441.) The violent impact from this movement, not caused by the engine, had brought the closed knuckles together with such force as to crush and practically amputate Stewart's forearm. There is nothing in the evidence to negative the reasonable supposition that this collision impact itself may have thrown the coupler mechanism out of adjustment. Since the plaintiff relied on a condition subsequent to the time at which Stewart was injured, the burden of proof was on the plaintiff to establish the basis of a reasonable inference that the condition of the mechanism at the time of Stewart's injury was the same as the subsequent condition upon which plaintiff relies. Not a word in the evidence furnishes the basis for such an inference. Accordingly, even if the presumption of non-negligence on the part of Stogner could be indulged as a basis for a finding that he gave a fair trial to the pin lifter and could not open the knuckle by its use, in spite of the fact that he did not testify to such fact, still no reasonable basis is laid by the evidence for an inference that the mechanism was in the same condition at the time of the injury to Stewart. See *Weekly* v. *Baltimore & O. R. Co.*, 4 F. (2d) 312, in which the Sixth Circuit Court of Appeals doubted whether a failure of a pin lifter completely to open a knuckle at a time subsequent to an accident in which that knuckle was involved, constituted any substantial basis for an inference that the mechanism was defective at the time of the accident.

Accordingly, we submit that the testimony of Stogner, given every reasonable inference in favor of petitioner, is wholly insufficient as a basis for an inference that the coupler mechanism was defective, not only when he operated it subsequent to the accident, but certainly at the time of

the accident to Stewart. Stogner's testimony does not help plaintiff at all except by the use of the same vice of inferring a safety appliance defect from a presumption of non-negligence of the employee (Stogner), which is used by petitioner in connection with the conduct of the deceased Stewart.

We submit, therefore, that the court below was right in holding that there was no substantial evidence to sustain the verdict, and in reversing the judgment of the district court with directions to grant defendant's motion for judgment in its favor notwithstanding the verdict.

Point Two.

In case this Court decides to review that now undecided question, there was reversible error in the trial court's charge, as held by the court below in its first, now vacated, opinion and judgment.

Assignment III (R. 356-357.)

Petitioner has asked this Court to review the entire record, consider all of respondent's assignments of error on the appeal below, to hold that all such assignments are without merit, and not only to reverse the last judgment of the court of appeals below but also to affirm the judgment of the district court in favor of petitioner. This makes it necessary for us to deal with some of the assignments not passed upon by the court below in this last judgment.

In its first opinion (R. 402, at 411) the court below sustained respondent's Assignment III, which assignment was as follows (R. 356-357):

> "The United States District Court erred in charging the jury, over the objection and exception of defendant, as follows:
>
> 'You are instructed that it was the duty of the deceased in the performance of his work, before going between the (fol. 540) cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, ex-

tending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars.'

"On the grounds that said charge is an incorrect statement of the law, for two reasons.

"1st. Because it puts the burden of proof on the defendant initially to show that no effort was made.

"2nd. Because it is a legal presumption which is wholly unwarranted by the law, and that such operation of the court's charge conflicts with the other portions of the charge in which the jury is told that the burden of proof that is necessary to warrant a recovery by plaintiff rests upon plaintiff throughout the trial; that the fact that the coupler would not work is presumed and it is in conflict with that portion of the court's charge."

What the court below said, in sustaining this assignment, and what it quoted from this Court, is entirely self-demonstrative of the soundness of the holding. It said (R. 411):

"4. The charge of the court to which an express specification of objection is preserved is, as has been said, erroneous for the reason that it is inconsistent with the burden of proof imposed by law upon a plaintiff. The Supreme Court has settled this question, as we think, finally and conclusively.

'In an action for damages for personal injuries while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

• • • • • • • • • •

'A plaintiff in the first instance must show negligence on the part of the defendant. * * * The negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another.'

"*Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 487, 488."

This Court will search through the entire charge of the trial court (R. 333-345) in vain to find that any other part of the charge cured the obvious error in the instruction covered by this assignment. Anything in other parts of the charge inconsistent with the error in the instruction covered by Assignment III would simply present the equally reversible vice of conflicting and inconsistent instructions.

Whatever this Court holds on the question on which certiorari was granted, we submit that the judgment of the district court should be reversed and at least remanded for new trial for this error in the charge. This, of course, unless this Court decides to remand to the Circuit Court of Appeals for its final decision upon the other Assignments of Error.

Point Three.

The administratrix not only made settlement and released her claim under express authorization of the probate court of Illinois which appointed her, but also, when she chose to repudiate the settlement and release, elected the remedy of a direct attack thereon for alleged fraud and duress in the said probate court. That court decided against her on the issues of fraud and duress. Its judgment is res judicata and could not be attacked in the liability action in the district court below.

Assignment XVI (R. 363-365.)

Assignment XXII (R. 368-377.)

Assignment XXVIII (III, XI, No. 4) (R. 393-396.)

In support of its defense of settlement and release, respondent offered in evidence the record of all the proceedings in the Probate Court of St. Clair County, Illinois, the court which appointed the plaintiff administratrix. The district court excluded these proceedings as irrelevant (R. 95) over respondent's exception and contention that the judgment of the said probate court was *res judicata*, binding upon plaintiff administratrix, could not be collaterally attacked and must be given full faith and credit by the district court.

Plaintiff sought and obtained an order of the Probate Court of St. Clair County, Illinois—the court which appointed her administratrix—approving the settlement she now seeks to impeach by collateral attack in this suit. That order authorized plaintiff administratrix to make the settlement and to give a full and complete release to respondent. (R. 96-98, 107-108.)

Thereafter, in the same court, plaintiff filed a petition charging that the settlement and release were procured by fraud and coercion of respondent's agents and attorneys, and praying an order setting aside the court's prior order authorizing the settlement. (R. 99.) Here, therefore, by

a *direct attack* on the settlement and release, plaintiff sought to and did litigate the very issues of fraud and duress which she relied upon later in the liability action below to vitiate the settlement and release. After hearing, the Probate Court denied the petition to set aside the order authorizing the settlement, thereby directly adjudicating against her the issues she sought to relitigate below. (R. 103.) It seems plain that this latter order of the Probate Court is *res judicata* of the issue of fraud and duress and cannot be collaterally attacked in this action.

In his reply to this point (supplemental brief, pp. 13-15) petitioner altogether ignores the second order of the Probate Court directly adjudicating the issue of fraud and duress, and insists he can here collaterally attack the earlier order approving the settlement because that order "was nugatory" since "it gave the administratrix no power she did not already possess." In support of this contention petitioner relies on the well-settled rule that an administrator, in an action of this character, "may compromise the claim without applying to the Probate Court or any other court for authority so to do" (*ibid.*, pp. 14-15). *Washington* v. *Louisville & Nashville R. Co.*, 136 Ill. 49, 26 N. E. 653; *Ringel* v. *Pearson*, 306 Ill. App. 285, 28 N. E. (2d) 576. But this is far from establishing that the Probate Court was *without jurisdiction* to make orders with reference to settlements by administrators appointed by it, as plaintiff must do in order to sustain its collateral attack here on the orders of that court.

Article 6, § 20, of the Illinois Constitution provides that probate courts "shall have original jurisdiction of all probate matters." To the same effect is Chapter 37, § 303, Illinois Revised Statutes, 1941. In *Re Bishop's Estate*, 370 Ill. 173, 18 N. E. (2d) 218, the Supreme Court of Illinois said:

> "In *Dibble* v. *Winter*, 247 Ill. 243, 93 N. E. 145, we said that in common usage the word 'probate' is often used as applying to any of the incidents of administration."

Certainly the settlement of a claim by an administratrix appointed by the Probate Court is "an incident of administration" as to which the Probate Court has jurisdiction. We do not see how it can be seriously controverted that it was within the jurisdiction of the Probate Court to make inquiry into whether a settlement and release made by an administratrix appointed by that court and subject to its supervision, and approved and authorized by that court, was procured by fraud and duress. And that inquiry was the very subject of the hearing resulting in the Probate Court's second order which plaintiff here seeks collaterally to attack. The fact that the present case was then pending in the federal district court in Missouri did not deprive the Illinois probate court of jurisdiction to pass, as it did, on the question of whether a release given by its administratrix was procured by duress. It had jurisdiction of the parties and of the subject-matter. Respondent was a party, by intervention, to that proceeding. (R. 103-105.)

In *Chicago, R. I. & P. Ry. Co.* v. *Schendel*, 270 U. S. 611, the administrator of the estate of an employee of an interstate railroad who had been killed in the course of his employment, instituted suit in a Minnesota court under the Federal Employers' Liability Act, to recover damages for the death. Thereafter, the employer filed a proceeding under the Iowa Workmen's Compensation Act, for a determination of its liability under that act. The widow, as sole beneficiary, was made an involuntary party to that proceeding, her objection being that her decedent was engaged in interstate commerce at the time of the injury and that the case was therefore subject to the federal rather than to the state law. Compensation was awarded the widow, and she appealed to the state district court, which held that decedent was not engaged in interstate commerce at the time of his death, and affirmed the award. There was no further appeal in the state courts. Thereafter the administrator brought on for trial his Liability Act case pending in the Minnesota court. The employer there contended that the

judgment of the Iowa court was *res judicata* on the issue of the character of commerce in which decedent was engaged at the time of the injury. But the Minnesota courts held this plea bad and rendered judgment for the administrator. This court, however, held that the judgment in the Iowa case was *res judicata* and that the issue there determined could not be relitigated in the Liability Act case. This Court said (p. 616):

> "The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as *res judicata*. *Boatmen's Bank* v. *Fritzlen*, 135 Fed. 650, 667; *Merritt* v. *American Steel-Barge Co.*, 79 Fed. 228, 234; *Williams* v. *Southern Pac. Co.*, 54 Cal. App. 571, 575. And see *Insurance Co.* v. *Harris*, 97 U. S. 331, 336, where the rule as stated was recognized.
>
> "The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified. *United States* v. *Moser*, 266 U. S. 236, 241, and cases cited. And, putting aside for the moment the question in respect of identity of parties, the judgment upon the point was none the less conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law."

There the crucial issue was whether or not the decedent was engaged in interstate commerce at the time of his death. Against the will of the administrator and the beneficiary in the pending Federal Employers' Liability Act case, the railroad submitted this issue to the Iowa state court, and its judgment was held *res judicata* in the Liability Act case. Our case is stronger, because here it was the administratrix and beneficiary herself who submitted the issue of the validity of the release to the Illinois probate court, and who now seeks to relitigate the very issue which she herself submitted to determination by the Illinois court.

True it was not necessary for the administratrix to submit the validity of the settlement to the Probate Court, as she did. She could have refrained from doing so, and permitted that issue to be litigated in the Liability Act case pending in the federal court in Missouri. So likewise it was not necessary for the railroad in the *Schendel Case* to submit to the Iowa court the question of whether its liability was governed by state or federal law. It could have waited for that question to be determined in the Federal Employers' Liability Act case then pending in the Minnesota court. But the Iowa court having determined the issue, this Court held it could not be relitigated in the Liability Act case. The same result must follow here.

It cannot be doubted that the Illinois probate court had as complete jurisdiction to determine the validity of a release executed by its own administratrix, responsible to it for the proper performance of her trust, and executed under its own express authority, as the state court in the *Schendel Case* had to pass on the issue of the character of commerce decedent was engaged in when killed—an issue going to the very heart of the pending Liability Act case.

Plaintiff may not now relitigate the issue passed upon by the Probate Court of Illinois, an issue within its jurisdiction to determine. *United States* v. *Paisley*, 26 Fed. Supp. 237.

We think the case of *Chicago, R. I. & P. Ry.* v. *Schendel, supra,* is conclusive on this point, that the judgment of the Illinois Probate Court, in a proceeding directly invoked by the voluntary petition of the administratrix was *res judicata,* was binding on the plaintiff administratrix in the liability action below, could not be there collaterally attacked and the same issue there relitigated, but had to be given full faith and credit. See also *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 88-90.

It follows that the district court below was in error in excluding the record of the probate court proceedings, in allowing the same issue of fraud and duress to be relitigated, in authorizing the jury to disregard or avoid the release and to return verdict for additional recovery for plaintiff, in not rendering judgment *non obstante veredicto* in favor of respondent, and in rendering judgment for plaintiff.

It further follows that, whatever may be this Court's decision on the question upon which certiorari was granted, in any event the judgment of the court below, reversing the judgment of the district court and remanding with directions to enter judgment for respondent notwithstanding the verdict, should be here affirmed on the grounds presented in this point.

Point Four.

The verdict of the jury is so indefinite as to be a nullity and in any event the judgment should have been reversed and remanded for new trial at least, by reason of this error.

Assignment VII (R. 394.)

In charging the jury on the issue of damages, the trial court gave the following wholly ambiguous and misleading charge:

> "You are further instructed that your award to plaintiff, if any, may not exceed the sum of $65,000, the amount claimed by plaintiff, less the sum of $5,000, the amount heretofore received by her." (R. 340.)

The court did not instruct the jury that, if they found a lesser than the maximum amount prayed as the damages to which plaintiff was entitled, they should also return verdict for such amount less the $5,000 plaintiff had already received. The jury returned a general verdict, finding for plaintiff in the amount of $17,500. (R. 20.) No one could tell from the verdict whether the jury intended that plaintiff should recover $17,500 in addition to the $5,000 she had already received, *i.e.*, an unnamed total of $22,500, or whether it intended that the $5,000 be deducted from the amount of $17,500 named in the verdict, that is, judgment for $12,500 more than she had already received.

The court put upon the verdict the construction most favorable to plaintiff and entered judgment for recovery of $17,500 in addition to the $5,000 plaintiff had already received, which meant total recovery of $22,500 instead of $17,500. (R. 20-21.) It, however, stayed execution pending ruling on respondent's motion for judgment *non obstante veredicto* or, in the alternative, for new trial. (R. 21-22.)

Respondent moved for judgment *non obstante veredicto*, or, in the alternative, for new trial, on the ground, *inter alia*, that the verdict was so indefinite as to be a nullity by reason of this ambiguity. (R. 22-24.) The district court overruled the motion as to this, as well as to all other grounds. (R. 24.)

Read in the light of the court's charge on damages, nobody can tell from the verdict whether the jury meant plaintiff to have a total recovery of only $17,500 or of $22,500. The more reasonable view would be that the jury understood that whatever they awarded in damages should be subject to the deduction of the $5,000 she had already received. Nothing in the verdict indicates an intention or understanding of the jury that plaintiff should recover a total of $22,500, $17,500 *plus* the $5,000 she had already received. The court's charge had instructed that the jury award was to be "less the sum of $5,000, the amount heretofore received by her."

The difference in the interpretation of this wholly ambiguous verdict is a difference of $5,000 in the recovery. In putting upon the situation the construction more favorable to plaintiff, by giving her $5,000 more of respondent's money, we submit that the district court was not exercising legal judgment but was speculating or guessing at the expense of the respondent. That is not fair play or due process of law.

Where the instructions to the jury leave it open to them to find upon either of two propositions or alternatives, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon the one rather than upon the other. *De Sollar* v. *Hanscome*, 158 U. S. 216, 221.

Such is the situation here. In any event the judgment of the district court should be reversed with remand, at least, for new trial, by reason of this clear error.

Point Five.

Numerous other assignments of error by respondent in the court below, but not passed upon by it, warrant reversal of the judgment of the district court and remand for new trial at least.

1. *Errors in instructions refused.*

Assignment VI (R. 359) presents, we submit, reversible error in the refusal by the trial court to give a proper, requested charge to scrutinize the testimony of an interested witness in the light of his interest. The court nowhere gave a comparable or equivalent charge.

Assignment VIII (R. 359-360) presents the same error.

2. *Errors in admission of evidence.*

Assignment XXIII (R. 378-383.)

Assignment XXV (R. 384-386.)

Practically all of the evidence bearing on the issue of duress was pure hearsay, not within any known exception to the hearsay rule, consisting of testimony by plaintiff and by her daughter as to what plaintiff's son-in-law, Hamm, who was not a witness, though available, told her regarding a crucial conversation between him and the attorney for the Terminal Railroad Association, Judge Howell, which conversation was the basis of the charge of duress.

Judge Howell, who had died before the trial, testified by deposition previously taken by plaintiff. His testimony (R. 145-154) completely refuted all the charges of duress, alleged to have been exerted by him on Hamm, and through Hamm, her son-in-law, on plaintiff. Plaintiff did not call her son-in-law, Hamm, to testify in contradiction to the testimony of Judge Howell. Instead the court, over objection and exception by respondent, allowed the plaintiff and Mrs. Hamm to recount at length their versions of what Hamm had told the plaintiff was said in the crucial conversation between Hamm and Judge Howell.

It was on this conversation and on this hearsay rebuttal of the Howell deposition that the court allowed the issue of duress to go to the jury. (R. 335-336.) There was no attempt to prove fraud and no claim of fraud except by allegation in the complaint.

We submit that the admission of this hearsay on the crucial issue of duress in the inducement of a release, which plaintiff had sworn to the probate court in Illinois was a fair settlement and agreed to by her and which, on her sworn petition was approved by that court, was reversible error.

We shall comment further upon this evidence under the next point.

Point Six.

Eliminating wholly incompetent evidence admitted over objection and exception, and the admission of which was assigned for error below, there was no sufficient evidence to sustain the verdict finding that the settlement and release by the administratrix was induced by duress and setting aside the release. The release was therefore a bar to the action and the judgment of the district court should be reversed with directions to enter judgment for respondent non obstante veredicto.

Assignment I (No. 6) (R. 349, 352.)

Assignment II (No. 6) (R. 353, 355, 356.)

Assignment IV (R. 357-358.)

Assignment XXI (R. 367, 368.)

Assignment XXIII (R. 378, 383.)

Assignment XXV (R. 384-390.)

Assignment XXVIII, Grounds IV, XI (No. 6) (R. 393-396, 394, 396.)

Although the plaintiff charged both fraud and duress in avoidance of the release pleaded by respondent, there was no other contention of fraud and no proof of fraud. Petitioner in his briefs here does not claim fraud. The whole theory for avoidance of the release is based on duress.

There was a showing that respondent's claim agent, Haun, was assidious in seeking to make a settlement with the administratrix, Mrs. Mary Stewart, that he saw her in various places at different times and constantly sought to make a settlement. The claim agent has the duty of settling cases with claimants if he can and he was performing his duty. No claim seems to be made that the conduct of the claim agent in and of itself, aside from the circumstances about to be referred to, constituted duress.

It is sufficient to refer to the statement contained in petitioner's Supplemental Statement, Brief and Argument (pp.

2-5) to see that the whole theory of duress in the inducement of the settlement is based on the fact that, at the instance of respondent's claim agent, Judge Howell, the General Attorney of the Terminal Railroad Association of St. Louis, in which association respondent is one of the proprietary lines, called to his office an employee of the Terminal Association, one Hamm, the son-in-law of the administratrix, Mrs. Stewart, and it is claimed that in the ensuing conversation in Judge Howell's office between Judge Howell and Hamm, the son-in-law of the administratrix, duress, in the form of a threat, covert, veiled, or implied, was applied to Hamm, in effect threatening him that if he did not influence his mother-in-law, the administratrix, to settle her claim with Southern Railway Company, Hamm might lose his job with the Terminal Railroad Association. The whole theory of duress is based on this supposed threat to Hamm, which was supposed to have been communicated by him to his mother-in-law, and which in turn was supposed to have overpowered her will and influenced her to make a settlement of her claim for $5,000, which otherwise she would not have made.

It was solely on the basis of this supposed threat to Hamm that he might lose his job, that the district court submitted the issue of duress to the jury, and obviously it was solely on the basis of this supposed threat to Hamm that the jury made its finding of duress and disregarded the release. That this is so is conclusively shown by the charge of the court below on the issue as to duress, which was as follows (R. 335-336):

> "The Court charges you that the only question for you to consider, so far as the release offered in evidence is concerned, is whether or not its execution was procured by fraud or duress. You are not, under the law, entitled to consider whether or not the amount paid was adequate for the death of the deceased, John R. Stewart.
>
> "If you believe from the evidence that there was no fraud or duress in the execution of the release, and the

settlement was consummated in good faith by the Southern Railway Company, then it is your duty to find the issues in favor of defendant, Southern Railway Company.

"The Court charges the jury, in determining whether the (fol. 507) release in evidence was procured by fraud or duress, you must not consider any representations, if any, made by defendant's attorneys or claim agents, that she had no valid cause of action against defendant, and that she could recover nothing against the defendant on account of the fatal injury to John R. Stewart, deceased.

"If you find and believe from the evidence that defendant, through its agents and servants, in the effort to induce plaintiff to make the settlement mentioned in the evidence, committed acts and used language for the purpose of leading plaintiff to believe that unless she made the settlement her son-in-law would lose his employment with the Terminal Railroad Association, and that plaintiff did so believe, and because thereof, if you so find, was put in such a state of fear as to be unable to act of her own free will, and that while under such fear and while unable to act of her own free will, if you so find, she agreed to the settlement, and did the things mentioned in the evidence in connection therewith; and if you further find and believe from the evidence that plaintiff would not otherwise have made the settlement; and if you further find that after the settlement was made plaintiff promptly rescinded the contract of release, and tendered to defendant the amount paid under (fol. 508) such settlement, then, you are instructed that the contract of release and settlement was not binding upon this plaintiff and should be disregarded by you."

If the supposed threat to the son-in-law, Hamm, is eliminated from the case, then the entire basis of the charge of duress is gone and nothing is left upon which the finding could rest. So it remains to consider how the evidence of the threat to Hamm was submitted to the jury.

Hamm himself was available as a witness. He was in East St. Louis and the administratrix, Mrs. Stewart, was staying at his house at the time of the trial. Mrs. Stewart talked to him the night before her testimony was given in

court. (R. 188.) Hamm was still working for the Terminal Railroad Association at the time of the trial and had not been discharged, although previously his mother-in-law, after having made settlement with respondent, had repudiated the settlement and had charged respondent with fraud and duress in inducing the settlement. (R. 259.)

If Hamm was threatened by Judge Howell in the crucial conversation between the two in Judge Howell's office, obviously it was an idle threat which never was carried out. However, the important consideration is that there was no competent proof of any such threat. Hamm was available and was not called to testify.

The plaintiff took the testimony of Judge Howell, as a deposition, by examination prior to the trial. (R. 145-154.) Judge Howell and Hamm alone knew what took place between them. Judge Howell's testimony is in the record. Hamm did not testify. The following is shown by Judge Howell's testimony.

He never knew that the administratrix had a claim against Southern Railway Company until Southern's claim agent, Mr. Haun, spoke to him about it. He did not know that a lawsuit was pending. The first he knew of a lawsuit was when Mr. Noell, the Missouri lawyer who represented Mrs. Stewart in her lawsuit, called him up and balled him out for interfering with Mr. Noell's business. (R. 149.)

Judge Howell called up the East side office and requested that they have Bill Hamm come into see him his first opportunity. (R. 147.) Hamm came into his office at about 11:30, on November 15. When he walked into the office Judge Howell said "How-do-you-do?" Hamm said, "What do you want with me?" Judge Howell said, "Sit down a minute, Hamm. I want to talk to you. I understand that your father-in-law, a switchman for the Southern, was killed over there, and the Southern is trying to effect an amicable settlement with your mother-in-law and they had about reached an agreement. They are offering to pay her five thousand dollars clear, and she is willing to take it,

but that you are standing in the way." Hamm replied, "Yes, I am, because I don't want that woman gypped out of what money she gets." Judge Howell said, "How about the five thousand dollars?" Hamm replied, "That is the reason; that is all right to settle for that, if she gets the five thousand dollars." (R. 149-150.)

It is obvious from all of the evidence that Mrs. Stewart was worried, not because she thought five thousand dollars was not an adequate amount for her to receive in settlement, but because she feared that her Missouri counsel would take part of the five thousand dollars as his counsel fees. What Hamm wanted was a guaranty against that.

Judge Howell asked Hamm what it would take to convince him that Mrs. Stewart would get the entire five thousand dollars. Hamm said he would want it put in writing. Judge Howell said that the railroad would hardly put it in writing but asked Hamm if he would be satisfied if Bruce Campbell, Illinois counsel for Southern Railway Company, would tell him that his mother-in-law would get the five thousand dollars clear and that Southern would stand all other expenses. Hamm finally said that if Judge Howell told him that he would believe it, and then he said that if Mr. Campbell told him the same thing he would believe it (R. 150).

Then the following occurred (R. 150-151):

> I said, 'Don't let us have any misunderstanding about this, Hamm.' I got this kind of quickly and I didn't understand (fol. 234) the situation. I turned around to my desk and called Bruce Campbell. I talked with Bruce Campbell and stated, in Mr. Hamm's presence, re-stated what I had already stated.
>
> Mr. Campbell says, 'That is correct.' He said, 'Is Hamm there?'
>
> I said, 'Hamm is right here now, listening, and Hamm says it is all right, that he thinks five thousand dollars is a reasonable settlement, if she gets that much money, and I have myself guaranteed him that she will get that, if you say so.'
>
> He says, 'Why not have him come right up here?'
>
> I said, 'That would be fine.'

I said to Hamm, 'Hamm, can you go right up to Mr. Campbell's office?'

He said, 'Sure.'

I said, 'Hop on a car.'

'You stay, Campbell, until he get there.'

'Go on, Hamm, and whatever Bruce Campbell tells you I will guarantee,' and he went out of the office. He said good-bye, shook hands, and away he went. That was the whole conversation.

At that time I was under the impression that it was an accident, and they were settling it up: I knew nothing more (fol. 235) about it, or heard nothing more about it until Mr. Noell called me up on the telephone and had a conversation about the suit. I said I didn't know there was a suit. I think the next morning I saw in the paper that there had been a suit filed.

Judge Howell had not seen Hamm since that conversation and did not even know Mrs. Stewart. There was not a thing said in the conversation between Judge Howell and Hamm, either directly or indirectly, that Hamm would be discharged or fired if the settlement was not made. Judge Howell knew what position Hamm occupied, that he was a good man, with a good record; and there was not a word said about his job, and nothing was said in any threatening manner. In fact, it would have been ridiculous, as Judge Howell testified, for him to have attempted to threaten Hamm about his job. Hamm would have laughed in his face and said, "You cannot take my job away, a man that has the seniority that I have. There has to be some good cause for it. That is the agreement with the Brotherhood, and sustained by the Labor Board." The job was not mentioned at all (R. 151-152).

Mr. Hamm was invited to Judge Howell's office and came there; although he was respectful in his attitude to Judge Howell, he was not at all afraid. He was not "called upon the carpet" (R. 153).

The foregoing is all of the competent evidence in the record as to what occurred between Judge Howell and Mr. Hamm in the crucial conversation between them upon which the whole theory of duress is grounded.

Now consider how the district court allowed that conversation to be submitted to the jury.

Without calling Hamm to testify, although he was perfectly available, the district court, over respondent's objection and exception on the ground that it was wholly incompetent hearsay, allowed Mrs. Stewart, Hamm's mother-in-law, to give the following testimony as to what Hamm had told her regarding his conversation with Judge Howell in the latter's office.

Mrs. Stewart learned from Hamm that he had had a talk with Judge Howell, that he had been called to Howell's office. Hamm told her that they had called him to the office to see Mr. Howell, Mr. Howell asked him about Mrs. Stewart's case, said he did not know there was a case of that kind, but said he had been notified to see if he could not urge Hamm to take the amount of money offered (R. 378).

Mrs. Stewart testified that Hamm had told her that when Mr. Howell suggested that he see Mr. Campbell it meant Hamm's job, so he had better go see Mr. Campbell. Mrs. Stewart testified that Hamm told her that it might mean his job and that she had better go see Mr. Campbell. (R. 378-379).

Mrs. Stewart testified that Hamm had told her that the Terminal Association was not hiring men his age and he might lose his job. The district court even allowed her to testify as to the effect on her of what Hamm said to her. She testified that she knew Hamm had been working for the Terminal Association a long time, and if he would lose his job he might not get another and he had a family, a wife and two children, to keep. She testified that after Hamm told her about the conversation between him and Judge Howell she was very worried and thought that if Hamm lost his job his wife and children would suffer and that she told him so, that if Hamm lost his job he might not get another (R. 379).

Mrs. Stewart testified that after her conversations with Hamm and with counsel for respondent she was just to where she did not know what to do, and the more she studied

she thought about those children that would suffer, and if Hamm lost his job she knew they would suffer, so she took the money (R. 380).

We submit that it needs no citation of authority to demonstrate that the foregoing testimony was wholly incompetent hearsay, not within any known exception to the hearsay evidence rule, and that its admission not only constituted reversible error but constituted an admission of purely hearsay evidence to establish the whole basis upon which the theory of duress was submitted to the jury. Without that hearsay there is no evidence of any suggestion of threat or duress applied to Hamm and through Hamm applied to Mrs. Stewart. See Wigmore on Evidence, 3rd Ed. vol. VI, secs. 1751-1791.

And further, the district court allowed testimony which was hearsay to the second degree to be given by Mrs. Hamm, the daughter of Mrs. Stewart, all admitted over exception and objection by respondent (R. 384-390), in which she related what she had heard her husband tell her mother as to what was said in the conversation between him and Judge Howell.

The district court allowed Mrs. Hamm to give the following testimony:

Mrs. Hamm heard the conversation between her husband and Mrs. Stewart about the conversation he had had with Mr. Howell in the latter's office. She said that Hamm told her mother that he had been called over to the legal department, and that it is not ordinarily done; that it was out of the ordinary, and that he knew it had a meaning behind it. She said that Hamm told her mother that Judge Howell told him that it would be a very good thing if the case was settled; and that Hamm said that he knew there was only one thing it could mean, and that was business. She testified that Hamm told her mother that it could only mean business, that they do not fool around inviting fellows over from work like that to have conversation with them and that they did not have to make a threat, their being interested in it was enough (R. 385).

The district court, over objection and exception, further allowed Mrs. Hamm to testify that she heard Hamm tell her mother that Judge Howell had told him that he would like for Mrs. Stewart to settle this matter; that Hamm had further told Mrs. Stewart that it would be a very good thing to do, because Hamm's being called into Judge Howell's office made it seem that his company's interest (the Terminal Association) was aroused towards this thing, and it would be the best thing concerning Hamm's position to have Mrs. Stewart go down and settle the thing; that Hamm and Mrs. Hamm both thought that the only thing to do was for Mrs. Stewart to settle her case (R. 387).

The district court allowed Mrs. Hamm to testify, again over objection and exception, that her husband and she and her mother-in-law had discussed the possibility of his losing his job and that that had been the main theory for settling the case (R. 389).

We submit that it was flagrant error for the district court to admit the wholly incompetent hearsay evidence of Mrs. Stewart and of Mrs. Hamm as to what Hamm had told them about the crucial conversation between Hamm and Judge Howell upon which the whole theory of duress was submitted to the jury. All of this testimony was admitted over objection and exception by respondent and was covered in many ways by the assignments of error referred to above.

Eliminating this wholly incompetent evidence, there is not a scintilla of evidence that any duress was applied to Mrs. Stewart, not a scintilla of evidence to justify the jury in finding duress and in avoiding for duress the release as a complete bar to the action.

In any event, therefore, we submit that, whatever this Court may hold on the Safety Appliance Act question upon which certiorari was granted, still the district court should have granted the respondent's motion for judgment *non obstante veredicto* on the ground that there was no sufficient evidence of duress to avoid the release.

It follows that in any event the judgment of the Circuit Court of Appeals below should be affirmed, unless this Court prefers to remand the case to the Circuit Court of Appeals below for final consideration of this question of duress and of the other questions hereinbefore discussed which the Circuit Court of Appeals has not finally passed upon.

Respectfully submitted,

WILDER LUCAS,
ARNOT L. SHEPPARD,
WALTER N. DAVIS,
H. O'B. COOPER,
SIDNEY S. ALDERMAN,
Attorneys for Respondent

S. R. PRINCE,
Of Counsel.